

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )

Price Cap Performance Review )

for Local Exchange Carriers; )

Treatment of Video Dialtone Services )

under Price Cap Regulation )

CC Docket No. 94-1

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COMMENTS OF ROCHESTER  
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April 14, 1995

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## Summary

Rochester<sup>1</sup> submits these comments in response to the Commission's Further Notice in this proceeding. The Commission requests comment on the mechanics of placing video dial-tone services under price cap regulation.

The very questions that the Commission poses demonstrate the irrelevance of the Commission's price cap regime to video dial-tone service. Video dial-tone is *not* an interstate access service, at least in the sense traditionally accepted. Moreover, the basis for the existence of any price regulation of access services -- namely, that they are not provided in a fully competitive market -- is completely absent with respect to video dial-tone. Exchange carrier video dial-tone offerings will be start-up services offering a competitive alternative to entrenched monopoly cable services. Detailed price regulation of these offerings is wholly unnecessary. At most, the Commission should regulate exchange carrier video dial-tone services in the same manner as it regulates AT&T's services that have been withdrawn from price caps.

If the Commission, however, decides to treat video dial-tone service under price cap regulation, it should adopt an entirely different regime from that which governs other exchange carrier interstate offerings. The concepts of pricing bands, productivity offsets, defined rate elements and sharing should be completely foreign to video dial-tone service. Thus, if price cap regulation is to apply to video dial-tone service, the Commission should place video dial-tone service in its own basket and design that basket accordingly.

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<sup>1</sup>

The abbreviations used in this summary are defined in the text.

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**COMMENTS OF ROCHESTER  
TELEPHONE CORP.**

***Introduction***

Rochester Telephone Corp. ("Rochester") submits these comments in response to the Commission's Further Notice in this proceeding.<sup>1</sup> The Commission requests comment on the mechanics of placing video dial-tone services under price cap regulation.<sup>2</sup>

The very questions that the Commission poses demonstrate the irrelevance of the Commission's price cap regime to video dial-tone service. Video dial-tone is *not* an interstate access service, at least in the sense traditionally accepted. Moreover, the basis for the existence of any price regulation of access services -- namely, that they are not

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<sup>1</sup> *Price Cap Performance Review for Local Exchange Carriers; Treatment of Video Dialtone Services under Price Cap Regulation*, CC Dkt. 94-1, Further Notice of Proposed Rulemaking, FCC 95-49 (Feb. 15, 1995) ("Further Notice").

<sup>2</sup> The Commission has already concluded that video dial-tone services should be treated as new services under price cap regulation. *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, CC Dkt. 87-266, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd. 244, 339-47, ¶¶ 205-223 (1994) ("Video Dial-Tone Reconsideration Order"). In this proceeding, the Commission is inquiring as to how video dial-tone service should be moved into price caps under the same time-frames as other new services that become subject to price cap regulation.

provided in a fully competitive market<sup>3</sup> -- is completely absent with respect to video dial-tone. Exchange carrier video dial-tone offerings will be start-up services offering a competitive alternative to entrenched monopoly cable services. Detailed price regulation of these offerings is wholly unnecessary. At most, the Commission should regulate exchange carrier video dial-tone services in the same manner as it regulates AT&T's services that have been withdrawn from price caps.<sup>4</sup>

If the Commission, however, decides to treat video dial-tone service under price cap regulation, it should adopt an entirely different regime from that which governs other exchange carrier interstate offerings. The concepts of pricing bands, productivity offsets, defined rate elements and sharing should be completely foreign to video dial-tone service. Thus, if price cap regulation is to apply to video dial-tone service, the Commission should place video dial-tone service in its own basket and design that basket accordingly.

### ***Argument***

#### **I. THE COMMISSION SHOULD NOT SUBJECT VIDEO DIAL-TONE SERVICE TO PRICE CAP REGULATION.**

The Commission initially designed its price cap regime as an alternative to rate base, rate-of-return regulation as a superior means of regulating interstate access

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<sup>3</sup> Rochester utilizes terms such as "less than fully competitive" to describe the *Commission's* characterization of interstate access services. There should be no implication that Rochester agrees with such characterizations.

<sup>4</sup> *Revisions to Price Cap Rules for AT&T Corp.*, CC Dkt. 93-197, Report and Order, 76 Rad. Reg. 2d (P&F) 1375, 1380-81, ¶¶ 26-31 (1995) ("AT&T Price Cap Review Order").

services.<sup>5</sup> The theory supporting any price regulation is that market forces, of themselves, are insufficient to constrain anticompetitive pricing behavior. Price cap regulation simply represents a more efficient form of regulation than cost-of-service regulation for such services.

The very nature of video dial-tone service suggests that it should not be subject to any more than the minimum amount of price regulation required by the Communications Act.<sup>6</sup> Exchange carrier video dial-tone offerings are start-up services that will provide competitive alternatives to entrenched cable monopolists. Unlike interstate access services -- where exchange carriers start with the lion's share of the market -- exchange carriers will enter the video transport and programming businesses with virtually no market share and no market power at all. Thus, there is little likelihood that exchange carriers could wreak competitive havoc on the incumbent cable monopolists solely by virtue of their market entry.

Nor is there any likelihood that exchange carriers could leverage whatever monopoly power they possess over interstate access services to advantage their video dial-tone offerings.<sup>7</sup> Even assuming that exchange carriers possess some market power over

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<sup>5</sup> See *Price Cap Performance Review for Local Exchange Carriers*, CC Dkt. 94-1, Notice of Proposed Rulemaking, 9 FCC Rcd. 1687, 1688, ¶¶ 11-12 (1994) ("Price Cap Performance Review Notice").

<sup>6</sup> Cf. *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995) (holding that the Communications Act does not permit tariffs to contain only ranges of rates).

<sup>7</sup> Indeed, given the competitive inroads made by competitive access providers, cable companies, interexchange carriers and others, it is doubtful that exchange carriers possess much market power with respect to interstate access services. In addition, the Commission has undertaken several initiatives to foster additional entry and competition in the interstate access business. E.g., *Expanded Interconnection with Local Telephone Company Facilities*,

interstate access services, their ability to leverage that market power to advantage their video dial-tone offerings is non-existent. The courts that have passed on the constitutionality of section 533(b) of the Communications Act have uniformly concluded that the opportunities for discriminatory conduct (*e.g.*, discrimination in pole and conduit access) are virtually nonexistent.<sup>8</sup> Cross-subsidization concerns are equally misplaced. Exchange carriers' other interstate services will remain subject to price cap regulation and, therefore, cannot be used to subsidize video dial-tone offerings. Moreover, the Commission has applied its cost allocation and related rules to exchange carriers' video dial-tone services, thus effectively separating the costs of video dial-tone from the costs of other interstate services. This regulatory regime is more than sufficient to preclude any possibility of anticompetitive pricing behavior with respect to video dial-tone services.

In addition, there is no possibility that the exchange carriers could price their video transport or video programming services in a manner that would injure consumers. Because video dial-tone will be an alternative to the incumbent cable monopolist, exchange carriers will need to price their transport services so as to attract programmers. Absent a robust package of programming, the end product will not be attractive to consumers. With respect to programming, exchange carriers' pricing will affect *only* the

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CC Dkt. 91-141, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd. 7369 (1992) (subsequent history omitted); *Transport Rate Structure and Pricing*, CC Dkt. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd. 7006 (1992) (subsequent history omitted). Competitive initiatives at the state level (*e.g.*, the Frontier Open Market Plan) are also opening all aspects of the local exchange business to competition.

<sup>8</sup> *E.g.*, *Chesapeake & Potomac Tel. Co. of Virginia v. United States*, No. 93-2340, slip op. at 34 (4th Cir. Nov. 21, 1994); *U S West, Inc. v. United States*, No 94-35775, slip op., WL 719064 at 9-10 (9th Cir. Dec. 30, 1994).

programming that they offer. If exchange carriers set the prices for such programming too high, consumers will simply not watch (or pay for) it. Alternatives will exist, both from the incumbent cable operator and from the other programmers that are offering their services over the exchange carrier's video dial-tone platform.

The existence of these obvious competitive alternatives compels the conclusion that the Commission should not subject video dial-tone service to price cap regulation at all. In finding that most of AT&T's services could be released from price cap regulation, the Commission concluded that those services faced substantial competition from other providers, such that it could rely upon market forces alone to constrain AT&T's pricing behavior.<sup>9</sup> The Commission reached this conclusion despite acknowledging AT&T's possession of a significant share of the market for interstate communications services.<sup>10</sup> Exchange carriers will be entering the video dial-tone (both transport and programming) with virtually no market share and, certainly, no market power. They will, moreover, be facing large, entrenched entities that to date have faced no effective competition. The Commission cannot, consistent with its own past analysis, subject exchange carriers' video dial-tone offerings to anything but the minimal price regulation required under the Communications Act. At most, the Commission should regulate video dial-tone as it

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<sup>9</sup> AT&T Price Cap Review Order, 76 Rad. Reg. 2d at 1379, ¶¶ 17-19.

<sup>10</sup> *Id.*



currently regulates those of AT&T's services that have been removed from price cap regulation.<sup>11</sup>

**II. IF THE COMMISSION SUBJECTS VIDEO DIAL-TONE SERVICE TO PRICE CAP REGULATION, IT MUST FUNDAMENTALLY ALTER THE DESIGN OF ITS PRICE CAP REGIME TO FIT THE ECONOMIC REALITIES OF THE SERVICE.**

If, as the Commission professes, it wishes to place video dial-tone service in its own basket to prevent the subsidization of this service by interstate access services,<sup>12</sup> it may do so. However, the remaining price cap constructs -- cap and basket indices and pricing bands, productivity offsets and sharing -- should be completely foreign to the regulation of video dial-tone service.

**A. The Current Waiver Process and Service Categories Are Unnecessary.**

Under the current regime, exchange carriers must seek Part 69 waivers prior to tariffing rate elements for a permanent video dial-tone service offering.<sup>13</sup> While the Commission is not proposing to codify video dial-tone rate elements, it should dispense altogether with the waiver process. Requiring exchange carriers to seek waivers of the Part 69 rules prior to tariffing a video dial-tone offering constitutes nothing but a waste of time. The Commission should eliminate this step and permit exchange carriers to propose

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<sup>11</sup> Such services are subject to streamlined regulation, essentially requiring AT&T to file tariffs on fourteen days' notice. See *id.*, 76 Rad. Reg. 2d at 1381, ¶ 27.

<sup>12</sup> Notice, ¶ 2.

<sup>13</sup> See Video Dial-Tone Reconsideration Order, 7 FCC Rcd. at 335-36, ¶ 197.

and defend video dial-tone rate elements in the tariff review process. The extra step of review is unnecessary.

Service categories within any video dial-tone basket are also unnecessary. Service categories were designed to minimize the extent to which exchange carriers could offset price decreases for one service with price increases for other services with similar characteristics -- e.g., different trunking services.<sup>14</sup> In the context of video dial-tone, service categories are unnecessary. Few, if any, of the services in such a basket could be substitutable for each other. For example, an end user access facility could not be substituted for the switching or transmission capabilities offered to a programmer-customer.

**B. A Price Cap Index, Service Basket Index and Productivity Offset Are Unnecessary.**

The price cap paradigm is designed to replicate the incentives and pricing decisions that would exist in a fully competitive market.<sup>15</sup> Thus, for services that the Commission has decided are not fully competitive, some pricing constraints -- both with respect to overall pricing levels and with respect to the pricing of individual services -- may be appropriate. The various price cap indices are designed to impose those pricing constraints.

In the context of video dial-tone service, such pricing constraints are not needed. Exchange carriers will not be offering video dial-tone service in a non-competitive

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<sup>14</sup> *Policies and Rules Concerning Rates for Dominant Carriers*, CC Dkt. 87-313, Second Report and Order, 5 FCC Rcd. 6786, 6810-11, ¶ 198 (1990) ("Price Cap Order").

<sup>15</sup> Price Cap Performance Review Notice, 9 FCC Rcd. at 1688, ¶ 12.

environment. Indeed, they will face significant competition from incumbent cable operators and others (including direct broadcast satellite). If an exchange carrier set the rates for the components of its video dial-tone offering too high -- either for programmer-customers or for end users -- each class has the option of utilizing alternate transmission services. End users could elect to remain with the incumbent cable operator, while programmer-customers may decline to subscribe to a particular exchange carrier's video dial-tone service and seek other alternatives for its programming.

In these circumstances, the upper pricing constraints imposed by a price cap index and a service basket index (with any accompanying bands) are unnecessary and should not be adopted. With respect to lower pricing constraints, the Commission should do no more than satisfy itself that the price for a video dial-tone rate element exceeds its associated incremental cost. If such a showing is made, then by definition, video dial-tone is not being subsidized by other services.

For similar reasons, the Commission should decline to impose any productivity offset with respect to video dial-tone service. The productivity offset is designed to ensure that consumers benefit over time from exchange carrier productivity gains.<sup>16</sup> As is true with respect to the indices, the productivity offset acts as a substitute for competitive forces. In the case of video dial-tone, such competition has existed from the outset, making a productivity offset unnecessary.

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<sup>16</sup>

*Id.*

Moreover, the Commission declined to adopt a productivity offset in its cable rate regulation regime.<sup>17</sup> It should certainly not adopt one here.

**C. Video Dial-Tone Service Should Be Excluded from Any Sharing Obligation.**

To the extent that a sharing obligation with respect to interstate access services continues to apply at all,<sup>18</sup> video dial-tone service should be completely excluded from any such obligation. Yet again, the Commission's price cap paradigm for interstate access services is completely inappropriate for video dial-tone. The Commission designed its sharing and lower formula adjustment mechanisms to account for uncertainty regarding the level of the productivity offsets that it selected.<sup>19</sup> No such uncertainty exists here,<sup>20</sup> and, therefore, neither a sharing mechanism nor a lower formula adjustment mechanism is necessary or appropriate.

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<sup>17</sup> Further Notice, ¶ 15 n.40.

<sup>18</sup> Under the Commission's newly-announced interim price cap plan, exchange carriers that elect the 5.3% productivity offset would have no sharing obligation. *Price Cap Performance Review for Local Exchange Carriers*, CC Dkt. 94-1, First Report and Order, FCC 95-132, ¶ 200 (April 7, 1995).

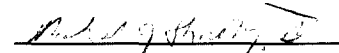
<sup>19</sup> Price Cap Order, 5 FCC Rcd. at 6787-88, ¶¶ 7-10.

<sup>20</sup> As described *supra* at 8-9, the productivity offset should be zero.

***Conclusion***

For the foregoing reasons, the Commission should act upon the proposals contained in the Further Notice in the manner set forth herein.

Respectfully submitted,



Michael J. Shortley, III

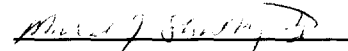
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April 14, 1995

### **Certificate of Service**

I hereby certify that, on this 14th day of April, 1995, the foregoing Comments of Rochester Telephone Corp. were served by first-class mail, postage prepaid, upon the parties on the attached service list.

  
Michael J. Shortley, III

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